

CC-2007-006

February 23, 2007

	Application of the Ex Parte Communication Rules to Remanded		Upon incorporation
Subject:	CDP Cases	Cancel Date:	into CCDM

PURPOSE

This notice provides guidance on the application of the ex parte rules to communications between Chief Counsel attorneys and the Office of Appeals when a Collection Due Process case arising under sections 6320(c) or 6330(d) is remanded by the Tax Court. This notice sets forth guidelines to assist Chief Counsel attorneys in striking a balance between the need to ensure compliance with the court's orders and to maintain Appeals' independence.

BACKGROUND

Section 1001(a)(4) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 689 (1998), directed the Commissioner to develop a plan to prohibit ex parte communications between Appeals employees and other Internal Revenue Service employees to the extent that those communications appear to compromise the independence of Appeals. Pursuant to this directive, the Service published Rev. Proc. 2000-43, 2000-2 C.B. 404, which provides guidance, in a question and answer format, regarding ex parte communications. The term "ex parte communications" is defined in Rev. Proc. 2000-43 as communications between Appeals and other Service functions without the participation of the taxpayer or the taxpayer's representative. Ex parte communications are prohibited to the extent they appear to compromise the independence of Appeals. Rev. Proc. 2000-43, Q&A-1.

Pursuant to Q&A-11 of Rev. Proc. 2000-43, the following communications between Appeals employees and Counsel attorneys are prohibited:

- Communications between Appeals and a Counsel field attorney who previously provided guidance to the originating function on the same issue in the same case that Appeals is reviewing. In this situation, a different Counsel attorney should be assigned to provide advice to Appeals regarding the issue.
- Communications regarding settlement ranges for an issue in a case pending before Appeals or for the case as a whole.

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- Communications regarding the demeanor or credibility of the taxpayer or the taxpayer's representative.

These guidelines, however, do not prohibit communications involving ministerial, administrative, or procedural matters. Rev. Proc. 2000-43, Q&A-5.

Docketed Tax Court cases are not subject to the guidelines in Rev. Proc. 2000-43, but rather are handled in accordance with Rev. Proc. 87-24, 1987-1 C.B. 720, and the Tax Court Rules. Rev. Proc. 2000-43, Q&A-11. The purpose of Rev. Proc. 87-24 is to develop or dispose of Tax Court cases through use of the administrative Appeals process. Rev. Proc. 87-24 does not specifically limit or otherwise define ex parte communications.

Revenue Procedure 2000-43 does not subject remanded CDP cases to the ex parte rules because the cases remain docketed with the Tax Court. When a CDP case is remanded, however, the Appeals employee resumes the role of an independent officer. Therefore, it is imperative that guidelines similar to those stated in Rev. Proc. 2000-43 be applied to these cases.

GUIDELINES

The following guidelines apply when a CDP case is remanded:

- (1) The Counsel attorney working the docketed case should prepare a written memorandum addressed to the Office of Appeals explaining the reasons why the court remanded the case to Appeals, any special requirements in the order (e.g., whether and to what extent a new conference should be held, and whether the case must be reassigned to a new Appeals Officer), and what issues the court has ordered Appeals to address on remand. A copy of the memorandum should be provided to the taxpayer or the taxpayer's representative.

The memorandum should not discuss the credibility of the taxpayer or the accuracy of the facts presented by the taxpayer.

The memorandum also should advise the Appeals Officer not to issue a standard notice of determination using Letter 3193, Notice of Determination Concerning Collection Action under Section 6320 and/or 6330. Instead, a Letter 3978, Supplemental Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, should be issued to the taxpayer.

- (2) A request by an Appeals Officer for legal advice in connection with the remanded CDP case may be handled by the Counsel attorney who is handling the docketed Tax Court case, so long as that attorney did not give legal advice to an originating function (e.g., collection) concerning the same issue in the same case. If the Counsel attorney provided such advice, the request should be assigned to another Counsel attorney who has not previously provided advice to a Service office concerning the same issue in the same case. Any legal advice should be carefully tailored to answer the legal questions posed by Appeals and should not opine on the ultimate issues to be addressed by Appeals in the Supplemental Notice of Determination. Requests for advice that raise novel legal issues should be coordinated with Branch 1, Collection, Bankruptcy & Summonses Division. Consistent with Q&A-11 of Rev. Proc. 2000-43, the advice does not have to be

shared with the taxpayer or his representative at the time it is rendered. Also, neither the taxpayer nor his representative have a right to participate in any discussions between Appeals and Counsel with respect to the advice.

- (3) The Counsel attorney who is handling the docketed case should review the supplemental notice of determination before it is issued to the taxpayer. This review is for the limited purpose of ensuring compliance with the Tax Court's order.

The following examples illustrate the application of the guidelines set forth in this notice:

Example 1

The taxpayer files a Tax Court petition seeking review of the Appeals Officer's CDP determination with respect to a proposed levy relating to the taxpayer's 2001, 2003, and 2004 tax liabilities. The taxpayer asserts that the 2001 assessment was barred by the statute of limitations and the payments applied to the 2001 tax year should be reapplied to the 2003 and 2004 tax years. The Tax Court agrees with the taxpayer that the 2001 assessment was barred by the statute of limitations. The Tax Court also finds that the Appeals Officer abused his discretion by not applying the payments as requested by the taxpayer. The Tax Court remands the case to Appeals for purposes of determining, based upon the court's findings, whether the taxpayer owes unpaid tax for the tax years 2003 and 2004 and whether Appeals and the taxpayer can agree on a collection alternative in the event there is any unpaid tax.

In this example, the Counsel attorney handling the case should send a memorandum to the Appeals Officer explaining the Tax Court's opinion. The memorandum should state that the case has been remanded for the purpose of determining whether the taxpayer owes unpaid tax after the payments that were erroneously applied to 2001 are reapplied to 2003 and 2004 and whether Appeals and the taxpayer can agree on a collection alternative in the event there is any unpaid tax. The memorandum also should state that the Appeals Officer is to treat the 2001 assessment as invalid and to reapply the payments erroneously applied to 2001 accordingly. The memorandum should instruct the Appeals Officer to issue the Supplemental Determination using Letter 3978, after review by the Counsel attorney for the limited purpose of ensuring compliance with the Tax Court's order. A memorandum of this nature is not a prohibited ex parte communication because it merely furnishes instructions and legal advice regarding the court's order, and does not address the substance of the issues to be considered by the Appeals Officer on remand. A copy of the memorandum should be sent to the taxpayer.

Example 2

The Tax Court determines that the Appeals Officer abused her discretion by failing to consider certain payments that the taxpayer claims were not properly credited to his account. Accordingly, the Tax Court remands the case to Appeals. The Counsel attorney assigned to the case telephones the Appeals Officer and explains that the case is being remanded and the Tax Court has ordered the Appeals Officer to consider the taxpayer's assertion that certain payments are not properly reflected on his account. During the discussion, the Counsel attorney tells the Appeals Officer that he believes that the taxpayer gave false testimony at trial and that he also believes that the taxpayer did not submit the payments.

In this example, Counsel attorney's statements regarding the payments and the truthfulness of the taxpayer's testimony address the accuracy of the facts presented by the taxpayer and the taxpayer's credibility. Consequently, they violate the ex parte communication rules.

Example 3

The Tax Court remands a Collection Due Process case to Appeals and the Counsel attorney assigned to the case sends a memorandum to Appeals explaining the remand order and issues to be considered. A few weeks later, the Counsel attorney sends the Appeals Officer an e-mail advising the Appeals Officer that the deadline for the proceedings on remand set forth in the Tax Court's order is approaching. See Rev. Proc. 2000-43, Q&A-5.

In this example, the e-mail is not a prohibited ex parte communication because it merely advises the Appeals Officer of the deadline for conducting the proceedings on remand, which is ministerial, administrative, or procedural in nature.

Any questions concerning the matters set forth above should be addressed to Branch 1, Collection, Bankruptcy and Summonses Division, Office of the Associate Chief Counsel (Procedure and Administration), at 202-622-3610.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure and Administration)